India

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I. Recent Developments in Indian Capital Markets Regulation

India is now one of the world's fastest growing economies. Its gross domestic product (GDP) grew by 6.7% in fiscal 2008–2009, while many developed economies contracted during the same period.[1] India, however, did not escape the global economic downturn, and there was a significant adverse impact on Indian companies' abilities to raise capital in the domestic and international capital markets. In the 2008–2009 fiscal year, capital raised through initial public offerings (IPOs) dropped to a six-year low, totaling US$432 million.[2] But with the "green shoots" of a global economic recovery showing signs in 2009, and the Indian government's economic stimulus package and commitment to economic reform, many Indian companies have raised equity in the domestic and international capital markets in the 2009-2010 fiscal year, including through IPOs and qualified institutional placements (QIPs).[3]

Like many of the world's equity market regulators, the Securities and Exchange Board of India (SEBI) embarked on several reforms to increase the transparency and effective-

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1. *See* Press Release, Gov't of India, Revised Estimates of Annual National Income, 2008-09 and Quarterly Estimates of Gross Domestic Product, 2008-09 (May 29, 2009), *available at* http://www.mospi.nic.in/pressnote_t4_29may09.pdf.

2. *See* Swapnil Mayekar, *Few Public Offers, Fewer Takers*, Bus. Standard, Apr. 8, 2009, *available at* http://www.business-standard.com/india/news/few-public-offers-fewer-takers/354354/.

3. For more information on stimulus packages *see* Dr. D. Subbarao Governor, Annual Policy Statement for the Year 2009-10, Reserve Bank of India (Apr. 21, 2009), http://rbi.org.in/scripts/NotificationUser.aspx?Id=4936&Mode=0. To date, leading India companies, including Adani Power, HDFC Bank, Indiabulls Financial Services, and Suzlon, have raised funds via IPOs and QIPs.

ness of their markets. In September 2009, the SEBI implemented the SEBI Issue of Capital and Disclosure Requirements Regulations (Regulations).[4] The previous rules, known as the SEBI Disclosure and Investor Protection Guidelines (Guidelines), were first promulgated in 1992, and last overhauled in 2000.[5] In the last nine years, the Guidelines were updated and modified through numerous formal SEBI circulars. The net effect was to create a body of regulation fraught with ambiguity and uncertainty. The new streamlined Regulations replace the Guidelines and are designed to make IPOs and QIPs more straightforward for Indian companies, and more attractive for domestic and international investors.

The Regulations clarify the tangled securities regulations, but they maintain the overall scope or scheme of Indian capital market regulations. While the changes strive to increase market efficiency and transparency, there are some key developments worth noting.

A. Abolition of Eligibility Norms

Under the Guidelines, certain banking and infrastructure companies were able to take advantage of exceptions from the eligibility norms regulating IPOs, but these exceptions have been abolished.[6] This represents a vote of confidence in the Indian banking and infrastructure markets, which no longer need the protection of this favorable policy.

B. Offers for Sale and Follow-on Offers

The Regulations also change the rules regarding "offers for sale." Previously, only unlisted companies pursuing IPOs were allowed to make offers for sale.[7] By altering the Regulations' definition of "further public offer," listed companies may now make additional sales of their equity securities.[8] The Regulations allow offers for sale to be made within one year of the filing of draft offer documents with the SEBI.[9]

C. Creation of the "Anchor Investor" Category

In June 2009, SEBI issued a circular creating a category of IPO investors called the "anchor investors," which is the equivalent of what is known in the international capital

4. *See* Securities and Exchange Board of India (Issue of Capital and Disclosure Requirement) Regulations, No. LAD-NRO/GN/2009-10/15/174471 (Aug. 26, 2009) [hereinafter Regulations], *available at* http://www.sebi.gov.in/guide/sebiidcrreg.pdf.

5. Securities and Exchange Board of India (SEBI), (Disclosure and Investor Protection) Guidelines of 2000 (2009) [hereinafter Guidelines], *available at* http://www.sebi.gov.in/guide/sebidipguideaug09.pdf.

6. *See* Guidelines, cl. 2.2.1(a), 2.4 (which exempted a banking company and an infrastructure company from the eligibility norms mentioned in the Guidelines, including, amongst others, the requirement to have net tangible assets of Rs. 3 crores (approximately $780,000). This exemption from complying with eligibility requirements has now been done away with in the new Regulations.).

7. *See* Guidelines, cl. 2.2.3.

8. *See* Regulations cl. 2(1)(n).

9. *See* Regulations cl. 26(6).

markets as the "cornerstone investor."[10] Later, this change was incorporated in the new Regulations.

In Indian public offerings, generally sixty percent of the offered shares are reserved for subscription from qualified institutional buyers (QIBs).[11] The anchor investor rules allow the reservation of up to thirty percent of the QIB allotment to be sold to anchor investors through a bidding process subject to a thirty-day lock-up following the closing of the IPO.[12] Under the Regulations, anchor investors are QIBs with a minimum application/bid value of approximately $2.1 million.[13] The bidding by anchor investors takes place the day before the shares are offered to the public and results must be disclosed before the public sale begins.

The introduction of the anchor investor concept is expected to reduce pre-IPO private placements and give confidence to retail investors to bid for securities in the IPO. Anchor investor backing traditionally provides a market signal as to IPO issuer strength. Since SEBI introduced the anchor investor category, several Indian companies have completed their IPOs with the inclusion of anchor investors.[14] Market commentators have suggested that the success of these deals was in part due to having such investors involved.[15]

D. Regulation of Promoters

In India, promoters (otherwise known as "significant shareholders") are a key part of the IPO process because of the active roles they generally play in the management of the company. For this reason, investors in Indian companies often place a premium on promoters when making investment decisions. In recognition of this reliance, SEBI altered some disclosure requirements for promoters to strengthen investor transparency.[16]

In an IPO, the Guidelines, and now the Regulations, require that promoters contribute at least twenty percent of the post-issue capital, signaling the promoters' commitment to the financial health and proper management of the issuer.[17] Previously, part of that capital was provided by promoter groups who were made up of friends, relatives, and associates of the actual promoters.[18] The Regulations are now more restrictive, requiring that

10. SEBI, Introduction of Concept of Anchor Investor in Public Issues through Book Building Route, Circular No. CFD/DIL/DIP/36/2009/09/07 (July 9, 2009) [hereinafter Anchor Investor Circular], *available at* http://www.sebi.gov.in/circulars/2009/cfdcir362009.pdf.

11. *See* SEBI, Securities Contracts (Regulation) Rules, 1957, rule 19(2)(b), *available at* http://www.sebi.gov.in/acts/act02c.pdf.

12. *See* Anchor Investor Circular ch. XI.

13. *See* Regulations cl. 10(1), sched. XI.

14. *See* Ahmedabad, *Adani IPO Brings Anchor Investors*, Times of India, July 28, 2009, http://timesofindia.indiatimes.com/biz/india-business/Adani-IPO-brings-anchor-investors/articleshow/4827757.cms. For example, Adani Power Ltd. and Indiabulls Power Ltd. completed their IPOs recently with the inclusion of anchor investors.

15. *See id.*

16. SEBI amended the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 on January 21, 2009 and inserted Regulation 8A, which requires promoters of a listed company to disclose details of shares pledged by them. For more information, *see* Press Release, SEBI Press Release No.58/2009 (Jan. 21, 2009) [herinafter SEBI Press Release], *available at* http://www.sebi.gov.in/press/2009/200958.html.

17. *See* Regulations cl. 32(1).

18. *See id.* cl. 2(1)(za).

only promoters who are disclosed as such in the offering document count toward reaching this minimum capital contribution requirement.[19]

Additionally, promoters must disclose any pledges made on their shares of the issuer company.[20] Indian markets generally view the pledging of one's shares as one of the last resorts for the raising of capital. The share pledges also have pricing implications because they can lead to changes in ownership and control of the issuer. As a result, SEBI now requires promoters to disclose pledges so that investors can take this information into account when evaluating an investment in such a company.[21]

Lastly, under the Guidelines, the employees and directors of an issuer's subsidiaries and holding companies were considered to be employees of the issuer when allocating stock reserved for the issuer's employees.[22] This provided promoters with a means to provide friends, relatives, and associates with "cheap stock," by appointing them to the boards of minor subsidiaries. Now, only the employees and directors of the actual issuer count as actual employees.[23] As a result, more shares are reserved for purchase by true employees.

E. Clarification of the Offer Period

Under the Guidelines, when an issuer revised the price band in a book-building issue, there was considerable confusion as to the length of the offer period. The Regulations now require that an offer period not exceed ten days, whether or not there is a band revision.[24]

F. Extension of the Validity Period of SEBI Observation Letters

In December 2008, just months after the Lehman Brothers collapse and amidst the capital market turmoil, SEBI extended the validity period of its observation letters[25] from three months to twelve.[26] If the period lapses without the completion of the offering, an issuer has to re-file the draft red herring prospectus with the SEBI. This change offers greater flexibility and was necessary because many Indian issuers were unable to complete their IPOs due to negative market forces.

19. *Id.* cl. 2(1)(zb).

20. SEBI Press Release No.58/2009, *supra* note 16.

21. *Id.*

22. *See* Guidelines cl. 1.2.1 (xii-b).

23. *See* Regulations cl. 2(1)(m).

24. *See id.* cl. 46(1).

25. An unlisted company seeking to raise capital through an IPO in India is required to file a draft red herring prospectus (DRHP) with SEBI in compliance with the Regulations. SEBI typically issues observations on the DRHP, which the issuer is expected to incorporate in the red herring prospectus filed with the Registrar of Companies and SEBI prior to the opening of the IPO. Previously, the Guidelines required that the IPO should close within three months of the date of SEBI observation letter. This has now been extended to twelve months. *See id.*

26. *See* Press Release, SEBI Board Meeting Minutes, PR No. 283/2008 (Dec. 4, 2008), *available at* http://www.sebi.gov.in/press/2008/2008283.html.

G. Participation of Retail Investors in Public Issues

Under the Guidelines, if retail investors wished to bid for shares, they would need to pay the full amount of their bid up front. If the bid was not accepted in full, the investors had to wait for their money to be refunded. The Regulations now permit the use of the "application/bid for shares supported by a blocked amount" facility (ASBA).[27] The syndicate bank can freeze the investment amount in the investor's account pending the resolution of the allotment, and then unfreeze any unused portion.[28] This mechanism provides retail investors with greater flexibility and liquidity in their investing choices, and is a mandatory feature for all book-built issues.

H. Summary

The SEBI reforms are designed to streamline and clarify existing rules and regulations to make the Indian capital markets friendlier for issuers and investors. The new Regulations clarify and update the old Guidelines in order to promote market efficiency and transparency. More than simply cleaning house, this is an important step toward improving the attractiveness of the Indian capital markets.

II. Foreign Currency Derivatives Litigation in India

The Reserve Bank of India (RBI) regulates foreign currency derivatives (forex derivatives). RBI does not permit speculative trading in forex derivatives, and Indian counterparties must enter into forex derivatives to hedge genuine underlying foreign currency risk. In the financial crisis of 2007-2008, the U.S. dollar (USD) weakened against global currencies. Many Indian corporations had hedged their underlying currency risk due to volatility in foreign currency exchange rates. They entered into forex derivative transactions with Indian banks on the basis of a strong USD.

Due to a sharp fall in the value of the USD–the Euro appreciated against the USD by 17.8%, the yen by more than 16%, and the Swiss Franc by 21%[29]–counterparties with exposure to forex derivatives suffered losses estimated to be between US$2 and 7 billion.[30] Several Indian corporations, challenging terms of the forex derivative contracts, filed suits. Because banks also reported losses from counterparty defaults to the tune of several hundred million dollars, recovery suits were filed in the Debt Recovery Tribunal (DRT), which is a specialized tribunal constituted under the Recovery of Debts Due to Banks and Financial Institutions Act of 1993[31] for the "expeditious adjudication and recovery of debts due to banks and financial institutions."

Three theories were advanced in suits by Indian corporations. First, forex derivative contracts were void *ab initio* because (a) they merely speculated on movements in foreign exchange thereby triggering the ban on "wagers" and "speculative contracts" under the

27. For more information on the ASBA mechanism, *see* Regulations cl. 2(1)(d), 58.

28. *Id.*

29. Tamal Bandyopadhyay, *Stung Firms Want Banks to Pay*, LiveMint, Mar. 17, 2008, http://www.livemint.com/2008/03/17002646/Stung-firms-want-banks-to-pay.html.

30. *Id.*

31. The Recovery of Debts Due to Banks and Financial Institutions Act, No. 51 of 1993; India Code (1993).

Indian Contract Act of 1872[32] and (b) there was no underlying exposure in these transactions as required by RBI regulations. Second, banks had induced companies to enter into the relevant transactions on the basis of misrepresentations and inadequate risk disclosures about these complex derivative products. Third, the banks did not ensure (a) that counterparties had a risk management policy, as mandated by RBI, and (b) in-principle compliance with the Comprehensive Guidelines on Derivatives dated April 20, 2007 (Guidelines)[33] by undertaking the necessary diligence and assessing the suitability of the counterparties.

The banks argued that forex derivative contracts did not qualify as a wager under contract law,[34] and that the element of speculation did not in itself make it a wager. Moreover, forex derivatives had legal recognition under the Reserve Bank of India Act 1934 (RBI Act)[35] as amended in 2006.[36] The media reported that some banks also wanted to involve the RBI in these litigations.[37] In addition, these banks countered that the allegations of inducement and misrepresentation were vague and made to avoid payment or defer liability.[38]

The primary issue relating to forex derivatives, whether they were "wagering contracts," and therefore, void *ab initio* under the Contract Act, was first settled by the Madras High Court in *Rajshree Sugars and Chemicals Limited v. AXIS Bank Limited* (Rajshree).[39] Rajshree challenged the legality of USD-Swiss Franc derivative transactions.[40] The Court held that forex derivative contracts were valid in law and not wagering contracts because: (1) there was no common intention to wager; (2) actual delivery of the contract could be compelled; and (3) there was an actual interest of the parties in currency fluctuations.[41] But, a division bench of the Madras High Court stayed the decision, and the final word on this issue is awaited.[42]

32. The Indian Contract Act, No. 9 of 1872; India Code (1872).

33. *See* The Reserve Bank of India, Comprehensive Guidelines on Derivatives, RBI Circular (RBI/2006-2007/333 DBOD.No.BP.BC. 86/21.04.157/2006-07) (2007), *available at* http://www.rbi.org.in/scripts/BS_CircularIndexDisplay.aspx?Id=3432.

34. To be characterized a wagering contract (1) there must be a common intention to wager, with each party holding opposite views from the other on the future uncertain event; (2) upon determination of the event, one must win and the other must lose; and (3) the actual interest of the parties is not in the occurrence of the event itself but in their stake in the occurrence. Rajshree Sugars & Chemicals Ltd. v. AXIS Bank Ltd., [2008] MANU/TN/0893/2008, C.S. No. 240 of 2008 ¶ 55 (Madras H.C.), *available at* http://www.indiankanoon.org/doc/149400.

35. The Reserve Bank of India Act, No. 2 of 1934; India Code (2009).

36. *Id.* ch. IIID.

37. Tamal Bandyopadhyay, *Banks Look to Bring RBI into Lawsuits*, LIVEMINT, Mar. 24, 2008, http://www.livemint.com/2008/03/24001440/Banks-look-to-bring-RBI-into-l.html.

38. *Id.*

39. Rajshree Sugars & Chems. Ltd., MANU/TN/0893/2008.

40. *Id.*

41. *Id.*

42. Rajshree obtained a stay on October 20, 2008 from a division bench of the Madras High Court. *See Rajshree Gets High Court Stay in Derivatives Case*, BUS. STANDARD, Oct. 21, 2008, http://www.business-standard.com/india/news/rajshree-gets-high-court-stay-in-derivatives-case/337883/.

ICICI Bank has also obtained a favorable order in which the Bombay High Court ordered payment of a disputed amount due under a forex derivative contract.[43] In addition, Kotak Mahindra Bank was successful in referring a suit to arbitration.[44]

Other proceedings instituted by banks include those for recovery of amounts due from counterparties, either in the DRT or in arbitration. A recent Indian Supreme Court judgment held that independent suits filed by counterparties in civil courts, including those in relation to the derivatives dispute, could not be transferred to the DRT at the behest of the banks.[45]

Also, in what has given a public law perspective to an essentially private contractual dispute, the Orissa High Court heard a public interest claim alleging that banks dealing in forex derivative products with corporate clients have, in connivance with the government, "defrauded" Indian companies.[46] After hearing the petition in August 2009, the Orissa High Court ordered a probe by the Central Bureau of Investigation (CBI). In November 2009, the CBI submitted a report finding prima facie evidence of violations of foreign exchange laws in the alleged scam and recommending that the violations be thoroughly investigated by the RBI and Enforcement Directorate.[47] The RBI has also filed a counter affidavit with the court in this matter, but the contents of the affidavit are not known.[48]

Reacting to the fiasco, the RBI has extended the applicability of the Guidelines, which, until recently, applied only to rupee derivatives or to over-the-counter (OTC) forex derivatives by way of a Master Circular issued in July 2009.[49] The Guidelines, *inter alia*, contain broad principles of risk management as well as the banks' obligations to undertake due diligence of "user appropriateness" and "suitability" of products being sold to corporate counterparties.[50] Though it would not affect pending litigation, the RBI issued draft guidelines on November 12, 2009 on OTC forex derivatives and hedging commodity price risk and freight risk overseas, and invited comments from the public. The draft guidelines incorporate the Guidelines with certain changes in light of worldwide financial market developments.

The Central Government is also grappling with the issue of regulatory overlap of derivative markets. While two reports recommend that derivatives regulation be made solely

43. ICICI Bank Ltd. v. Sundaram Multipap Ltd., Co., [2008] Petition No. 248 of 2008 (Madras H.C.), *available at* http://www.livemint.com/A68D99A9-3844-4C30-82C7-E1831D616B21ArtVPF.pdf.

44. Sundaram Brake Linings v. Kotak Mahindra Bank, [2008] Petition No. 139 of 2008 (Madras H.C.).

45. Nahar Indus. Enters. Ltd. v. Hongkong & Shanghai Banking Corp., [2008] MANU/SC/1330/2009 (India).

46. Nageshwar Patnaik, *Orissa High Court Orders CBI Probe into Multi-Crore Derivative Scam*, ECON. TIMES (Aug. 28, 2009), http://economictimes.indiatimes.com/news/politics/nation/Orissa-High-Court-orders-CBI-probe-into-multi-crore-derivative-scam-/articleshow/4946141.cms.

47. *Derivative Scam: CBI Submits Report to Court*, HINDU, Nov. 5, 2009, *available at* http://www.thehindu.com/2009/11/05/stories/2009110556400300.htm .

48. *Id.*; Neha Pal, *Banks Violated FEMA in Forex Derivatives Contracts: CBI*, FIN. EXPRESS, Nov. 9, 2009, http://www.financialexpress.com/news/banks-violated-fema-in-forex-derivatives-contracts-cbi/538917/2.

49. *See* Reserve Bank of India, Master Circular on Risk Management and Inter-Bank Dealings, RBI/2008-09/19 Master Circular No. 06/2008-09 (2008) [hereinafter Master Circular RBI/2008-09/19], *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/85346; Reserve Bank of India, Master Circular on Risk Management and Inter-Bank Dealings, RBI/2009-10/26 Master Circular No. 06/2009 (2009) [hereinafter Master Circular RBI/2009-10/26], *available at* http://rbidocs.rbi.org.in/rdocs/notification/PDFs/26MCRM010709.pdf.

50. Master Circular RBI/2008-09/19, *supra* note 49; Master Circular RBI/2009-10/26, *supra* note 49.

the responsibility of the SEBI,[51] the RBI in a recent publication has expressed the view that the Central Bank, which regulates at least one of the entities in a derivatives transaction, is best suited for the role of the single regulator.[52]

Forex derivatives continue to be an important tool for commercial risk management and are essential for the healthy development of the Indian financial markets. The RBI, corporations, and banks must continue to work together to address systemic weaknesses, remove ambiguities, and standardize laws and market practices regarding such instruments to prevent future litigation.

III. New ISP Liability Rules in India

While the Information Technology Enabled Services (ITES) and the Business Process Outsourcing (BPO) services sector have made India a household name all over the world, internet penetration and access in India has been hampered by lack of awareness, high access costs, and lack of adequate infrastructure. A largely outbound use of information technology in India made issues such as liability of internet service providers (ISP) largely academic until a few years ago, when the increasing availability of online pornography, unlicensed software, and unlicensed music and films prompted more frequent internet use domestically.

Studies in India claim some "81 million people in India are connected to the Internet,"[53] although this number remains low in comparison to China where some 298 million people are connected.[54] Coupled with the proliferation of wireless internet access and the impending introduction of 3G technology,[55] the medium's relevance in India now also encompasses more than 400 million cellular phone users.

A. Calls to Protect the ISP's

With the steady emergence of the internet in India, calls for insulating the so-called "engines" of the internet from liability increased to a crescendo after the December 2004 arrest of the CEO of eBay's Indian subsidiary, *bazee.com*, on charges of being complicit in the distribution of pornography. Up until the recent amendments to the Information Technology (IT) Act 2000, the liability provision for "network service providers" mandated that they exercise "all due diligence" to prevent commission of an offence or contravention.[56] The provision permitted both criminal or civil proceedings against the entity,

51. Ministry of Fin., Gov't of India, Report of the High Powered Expert Committee on Making Mumbai an International Financial Centre xxvi (2007), *available at* http://www.finmin.nic.in/mifc/mifcreport.pdf; Planning Comm'n, Gov't of India, A Hundred Small Steps: Report of the Committee on Financial Sector Reform 12 (2007), *available at* http://planningcommission.nic.in/reports/genrep/rep_fr/cfsr_all.pdf.

52. Reserve Bank of India, Report on Trend and Progress of Banking in India 2008-09 267 (2009), *available at* http://rbidocs.rbi.org.in/rdocs/Publications/PDFs/RTP0809PRD_Full.pdf.

53. *See* Sriram Vadlamani, *With 81 Million Internet Users, India Is Ranked 4th Globally*, TRAK.IN, Dec. 12, 2008, http://trak.in/tags/business/2008/12/03/with-81-million-internet-users-india-is-ranked-4th-globally/.

54. China Internet Network Info., The 23rd Statistical Survey Report on Internet Development in China, China Internet Network Information Center (2009), *available at* http://www.cnnic.net.cn/uploadfiles/pdf/2009/1/13/92458.pdf.

55. Two state run telecom service providers already offer 3G services.

56. *See* The Information Technology Act, § 79, No. 1, Acts of Parliament, 2000 [hereinafter Information Technology Act 2000] (stating that: (a) "Network Service Provider" means an intermediary; (b) "Third Party

which meant the arrest of top management (as in the *bazee.com* case) and injunctions in civil proceedings to restrain copyright infringement. Compliance with such injunctions was almost never feasible, resulting in frequent claims of contempt of court. Section 79 of the IT Act 2000[57] was considered completely at odds with the prevailing world trend to limit liability for online actors in certain situations.

Initially, vociferous objections by rights owners and law enforcement agencies resulted in the draft amendments being referred to the Parliament Standing Committee on IT. After taking evidence and seeking the views of "stake holders," which included law enforcement agencies such as the Central Bureau of Investigation,[58] the Committee approved of the proposed amendments to Section 79,[59] which sought to follow the E.U. Directive on E-Commerce 2000/31/EC, issued on June 8, 2000, by providing that ISP would not be liable at the outset, and providing for compliance procedures for ISP through take-down provisions.[60] According to the Expert Committee,[61] this revision was done in order to create a "legal framework to ensure the free movement of information society services between Member States" by establishing definitions, liability, obligations, and benefits under European Union law for Information Society Services including ISPs within Europe.[62] While the bill was approved by Parliament quickly and without debate in December 2008, the required notification by the Government was not issued until October 27, 2009, thus bringing the amendments and rules attendant of the Act into effect as of that date.[63]

B. Broadly Defining "Intermediaries"

The amendment defines "intermediary" with respect to any electronic record,[64] replacing the narrower term network service provider.[65] The new definition specifically classi-

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Information" means any information dealt with by a network service provider in his capacity as an intermediary).

57. *Id.*; *see also* The Information Technology (Amendment) Act 2008 § 79, No. 10; India Code (2009) [hereinafter Information Technology Amendment 2008].

58. Including law enforcement agencies such as the Central Bureau of Investigation which opposed diluting the "ISP liability provision." *See* Information Technology Act 2000, § 79 (stating that the proposed amendments to Section 79 would "enable" criminals).

59. Department of Information Technology, Ministry of Communications & Information Technology, Gov't of India, Report of the Expert Committee: Proposed Amendments to Information Technology Act 2000 Ch. IX Sec. 44 (2005), *available at* http://www.mit.gov.in/download/ITAct.doc.

60. Department of Information Technology, Ministry of Communications & Information Technology, Gov't of India, Report of the Expert Committee: Proposed Amendments to Information Technology Act 2000, summary ¶ 17 (2005), *available at* http://www.mit.gov.in/download/Summary-final.doc.

61. Department of Information Technology, Report of the Expert Committeee, Proposed Amendments to Info. Tech. Act of 2000, ITAA (P)-2005 (2005), http://www.mit.gov.in/default.ASPX?id=220 (constituted by the Department of Information Technology, Ministry of Communications & Information Technology, Gov't of India, to suggest the ambit and language of the proposed amendments).

62. Council Directive 2000/31/EC, 2000 O.J. (L 178) 1-16.

63. Press Release, Bureau Mumbai, Ministry of Communication & Information Technology, Information Technology (Amendment) Act, 2008 Comes into Force (Oct. 27, 2009), http://pibmumbai.gov.in/scripts/detail.asp?releaseId=E2009PR1153.

64. Information Technology Amendment 2008 § 2(w).

65. *Id.* § 79.

fies intermediaries as including "telecom service providers, Internet service providers, web-hosting service providers, search engines, online payment sites, online auction sites, online market places, and cyber cafes."[66] This broad and unprecedented definition leaves no doubt about the identity of the parties protected under the new Section 79.[67]

C. Qualified Immunity for "Intermediaries"

The new Section 79 provides immunity to intermediaries in relation to liabilities arising not only under the IT Act 2000 but also by virtue of a non-obstante clause[68] for liabilities arising under any law in force in India. Intermediaries have been provided this safe harbor for any "third party information, data, or communication link made available or hosted by the intermediary."[69] Thus, this extension of immunity apparently includes every conceivable criminal or actionable act, including acts of defamation, obscenity, and more pertinently, claims of copyright and trademark infringement. There are limits, however, as Section 79 makes clear that the protection is only available to intermediaries, such as online auction sites, search engines, and web-hosting services who: (a) provide access to a "communication system" over which third-party content is transmitted or temporarily stored or hosted; or (b) do not (1) initiate communication, (2) select the recipient, and (3) select or modify the information contained in the transmission.[70]

Section 79(2)(c) requires intermediaries, in addition to the twin tests above, to observe "due diligence"[71] while discharging their duties under this Act and also provides this "safe harbor" for any intermediary who "also observes such other guidelines as the Central Government may prescribe in this behalf."[72]

Section 79(3) also clarifies that the safe harbor provision of Section 79(1) does not apply if:

> (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.[73]

D. What Constitutes "Due Diligence"?

There is little judicial precedent defining the term "due diligence" vis-a-vis online intermediaries in India. In the case of *Avnish Bajaj v. State of Delhi*, the Delhi High Court

66. *Id.* § 2(w).
67. *Id.* § 79.
68. Notwithstanding anything contained in other law for the time being in force.
69. Information Technology (Amendment) Act 2008, § 79(1).
70. *Id.* § 79 (2).
71. Due Diligence has not been defined in the IT [Amendment] Act 2008. The definition will thus more likely be subject to judicial interpretation.
72. Information Technology Act 2000, § 73(c).
73. *Id.* § 79(3).

considered the alleged culpability of bazee.com, its managing director, and other corporate officers on charges of publication and distribution of pornographic material over the internet.[74] The Court examined the business of the portal before the hosting of the pornographic materials and after discovery of the materials.[75] The Court, while noticing the presence of a filter for objectionable material, observed that the filters were "rudimentary, grossly inadequate, and perfunctory," and that "[v]arious other interactive web portals like jeevansaathi.com, naukri.com, etc. adopt various measures like delayed insertion and regular online monitoring. [Thus] even the established industry norms to prevent offensive content from coming up on websites were totally ignored."[76]

The Court also noted that:

> [T]he investigation reveals that the policies and conduct of bazee.com [and] its [Managing Director] was designed to increase sale and maximize profits. Safeguard of prevailing moral values and prurient interests of any person in particular and the society at large was not a pressing agenda. The investigations found that the policy makers of the company were negligent in dealing with the matter and failed to exercise due diligence.[77]

While the Court dismissed the managing director from the proceedings in this case, it did find sufficient grounds for the criminal prosecution against the company and certain named employees.[78]

Clearly, the due diligence required by an intermediary to be covered by the safe harbor in Section 79(1) relates to industry best practices and requires a fact-based showing of how and when an intermediary's internal checks and filtering were implemented. The ambiguity presented by the term due diligence means that intermediaries, even after the amendment, may be liable for an insufficient exercise of due diligence and, more importantly, still bear the burden of proving that there was indeed an exercise of due diligence commensurate with industry best practices.

E. Limited Immunity

At first blush, Section 79(1) appears to provide immunity to online intermediaries, and Section 79(2)(c) imposes a due diligence condition for an intermediary to qualify for immunity. This is different from the laws in other jurisdictions, such as the safe harbor provision in the United States for copyright infringement[79] or the E.U. Directive on E-Commerce,[80] which provides immunity to intermediaries based on the type of acts with which they are associated, such as access-only entities or entities that do not select recipients and the information or modify the information made available.

Under the now-repealed language of Section 79 "network service providers" were deemed not to be liable if they proved that they had exercised "due diligence." Under the

74. Avnish Bajaj v. State, 150 DLT 279 (May 2008) (India).
75. *Id.* ¶ 1.1.
76. *Id.* ¶ 19.3.
77. *Id.*
78. *Id.* ¶ 19.5.
79. Limitations on Liability Relating to Material Online, Copyright Law, 17 U.S.C. § 512 (1998).
80. Council Directive 2000/31, 2000 O.J. (L 178) 1-16 (EC).

revised provision, the requirement to exercise due diligence remains[81] and is linked to yet-to-be-authored guidelines to be prescribed by the Central Government of India, which adds an unfortunate element of uncertainty. This provision was inserted upon objections from the Parliamentary Standing Committee, which had favored intermediaries being required to initiate due diligence procedures as a matter of normal course.[82]

A further condition of network service provider immunity is reflected in Section 79(3), which mandates that Section 79(1) shall not apply when the intermediary fails to remove objectionable material expeditiously upon receiving actual knowledge or notification from the Government or its agencies.[83] This "take-down" provision mirrors current legislation in many countries but does not contain provisions for "counter notices" by third parties who have uploaded what may be claimed to be objectionable or infringing content on the intermediary's resources.[84] The concern is that in the absence of a counter notice provision, intermediaries and individuals may be open to claims of harassment without recourse to a remedy for opposing take-down notices received from parties claiming, for example, defamation or copyright infringement.

F. Summary

While the amendment is a step forward and is reflective of the trend towards an increasing internet economy, a careful reading reveals ambiguity and uncertainty about the actual effect of the "safe harbor" provision. Given the ambiguities present in Section 79, the provision will no doubt be assessed and reassessed by the courts in India until a definitive Indian Supreme Court ruling is obtained. It must also be remembered that even given somewhat similar provisions in other jurisdictions, such as the United States or Europe, this ambiguity has not prevented owners from initiating legal proceedings based on claims of primary and secondary infringement of copyright against large online intermediaries, such as YouTube and Google. While the basic intention of the amendment is clear, what is unclear is whether the provisions will assist in stemming piracy, preventing online intermediaries from being harassed by frivolous legal proceedings, and assisting IP owners to efficiently monetize their IP. This is perhaps a tall order.

IV. India and the WTO Doha Round

India has emerged as a leading voice in the Doha Round negotiations.[85] The Doha Development Round is the current trade negotiation round of the World Trade Organization (WTO). India's leadership is not surprising. India was one of the original contracting parties to the General Agreement on Tariffs and Trade (GATT) in 1947, and was

81. By insertion of the disjunctive sub-clause (c) to Section 79 clause (2). Information Technology (Amendment) Act 2008, § 79(2)(c).

82. Parliamentary Standing Committee, Report on the Amendments to the Information Technology Act 2000, (July 9, 2007).

83. Information Technology (Amendment) Act, § 79(3).

84. For example, The Digital Millennium Copyright Act enacted in America. *See, e.g.*, The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

85. *See India Makes Global Moves with Trade Talks Meet*, Fin. Express, Sept. 3, 2009, *available at* http://www.financialexpress.com/printer/news/512105/ (noting that India has been a lead negotiator on behalf of emerging countries).

a founding member of the WTO in 1995. India is a savvy negotiator and frequent complainant in WTO disputes. India has been part of the inner circle of negotiators since early in the negotiations and was one of the founding members of the G-20.[86] India's leadership role also may have developed in part because, as United States Trade Representative (USTR) Ron Kirk noted recently, India is "uniquely positioned" to be an "honest broker" in the sense that it represents both "what is going to be one of the real emerging economies in the world but at the same time can be a powerful applicant for the needs of the poorest countries."[87]

Some have argued that India's leadership on behalf of the developing countries led to the July 2008 stalemate in the negotiations, when then-Commerce Minister Kamal Nath declared he would not risk the livelihoods of millions of farmers.[88] Although there were a host of reasons for the breakdown in talks, the final stand-off in July 2008 was triggered by disagreements—primarily among the United States, India, and China—regarding the special safeguard mechanism (SSM) threshold that would allow developing countries to impose a tariff on imports of heavily subsidized agricultural products from the developed world in the event of a drop in prices or surge in imports.[89] Little progress can be reported as of the time this article was submitted for publication; despite several multilateral and bilateral discussions during the latter half of 2009, there were no significant breakthroughs with regard to key issues such as agriculture, non-agriculture market access (NAMA), or services.

WTO negotiations were virtually suspended during the first half of 2009. As the Obama Administration was getting settled in, India was busy with its own elections. In May 2009, the elections in India resulted in a major victory for the Congress-led United Progressive Alliance and a defeat for India's Communist Party. The election results were cited as a reason that India might be in a position to move forward more confidently in the negotiations.[90] This prediction seemed to play out when New Delhi played host to more than thirty-five members of the WTO on September 3-4, 2009.[91] By hosting these meetings, India signaled to the world that it wished to lead the way to a positive outcome in the negotiations.

The meeting in New Delhi was important because it was the first such gathering since July 2008, with ministers from practically all major blocs in attendance, including the G-10, G-33, G-20, NAMA 11, Least Developed Countries, Small and Vulnerable Economies, African Group, Cotton 4, and others.[92] But despite claims of a breakthrough in the

86. *See* Atul Kaushik, Briefing Paper: India's Stand in the WTO Doha Round (2009), http://www.cuts-citee.org/pdf/BP09-WTO-01.pdf.

87. *G. Srinivasan, Arbitrary Deadline Feasible on Doha Round Now*, Hindu Bus. Line, Oct. 28, 2009.

88. *See* Rhys Blakely, *India Blamed for Doha Collapse by Trying to Protect Poor Farmers*, Times Online, July 30, 2008, http://business.timesonline.co.uk/tol/business/economics/article4427725.ece.

89. *See World Trade Talks End in Collapse*, BBC News, July 29, 2008, http://news.bbc.co.uk/2/hi/business/7531099.stm.

90. *See* Tripti Lahiri, *New Delhi 'Breakthrough' Sets Restart of Doha Round Ag, NAMA Talks for Sept. 14*, 26 *Int'l Trade Rep.* (BNA) 1191 (Sept. 10, 2009), *available at* http://www.bna.com/itr/arch514.htm.

91. *See id.*

92. *Doha Talks: India Against Change in Modalities*, Rediff Bus., Aug. 31, 2009, http://business.rediff.com/report/2009/aug/31/wto-doha-talks-india-against-change-in-modalities.htm.

negotiations and statements that the negotiations were in the "endgame," critics noted that there were no developments on substance during the September meetings.[93]

Several subsequent gatherings have taken place since the September meetings in New Delhi, but none of the discussions have resulted in any substantive progress on the issues as of the time this Article was submitted for publication. During the September discussions, participants re-affirmed their commitment to a 2010 conclusion to the Doha Round, which previously had been announced by leaders of the G-8.[94] Senior officials from WTO member countries, including the European Union, United States, Brazil, India, China, Japan, and others,[95] met again in Geneva the week of September 14, and were tasked with developing work plans on the specific issues. Although there was no progress on substance, there was an increasing awareness that the multilateral talks would remain stalled until the United States made further progress with key trading partners,[96] particularly India.

India and the United States engaged on a few occasions since the September meetings in New Delhi. In early October, senior trade officials from the United States, Brazil, and India met. Brazil and India have been critical of the Obama Administration for failing to provide specific demands in the talks, while the United States seeks clarity on how Brazil, India, and China plan on utilizing proposed flexibilities for developing countries to shield certain agricultural and industrial lines from agreed cuts.[97] These talks were reportedly unsuccessful.[98] Several weeks later, USTR Ron Kirk again met with India's Commerce Minister Anand Sharma as part of the United States-India Trade Policy Forum. The United States was accused again during these meetings of neither specifying its demands, nor providing information on what it was willing to offer in terms of further concessions.[99]

The agricultural negotiations regarding the SSM triggered the collapse of the Doha Round negotiations in July 2008. The aim of the SSM is to protect poor farmers by allowing countries to impose a special tariff in the event of a drop in prices or surge in imports. The United States and India were unable to agree on the point at which developing countries could temporarily raise farm tariffs above maximum WTO-permitted rates.[100] India argued for the right to start imposing tariffs above their existing maximum rates when imports exceed ten percent over the previous three-year average and with a permitted increase thirty percent above existing bound tariff rates.[101] The United States

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93. Vikas Bajaj, *At Early Forum on Trade, Few Signs of Concessions*, N.Y. TIMES, Sept. 5, 2009, http://query.nytimes.com/gst/fullpage.html?res=9903EFD81039F936A3575AC0A96F9C8B63&sec=&spon=&pagewanted=all.

94. *See* Promoting the Global Agenda, Statement by the Leaders of Italy, Brazil, Canada, the People's Republic of China, France, Germany, India, Japan, Mexico, Russia, South Africa, the United Kingdom, the United States of America and the President of the European Commission, together with the Leaders of Egypt and Sweden, (July 9, 2009), *available at* http://pmindia.nic.in/report1_09.07.09.pdf.

95. *See WTO Members to Meet Sept. 14*, FOOD & FIBER LETTER, Sept. 14, 2009.

96. *Senior Officials Make Slow Progress On Doha Round In Geneva*, INSIDE U.S. TRADE, Sept. 18, 2009.

97. Daniel Pruzin, *Officials Downbeat After U.S.-India, Brazil Talks in Paris on Doha Round, Int'l Trade Daily*, (BNA) (Oct. 9, 2009).

98. *Id.*

99. *U.S. Ramps Up Bilateral Meetings on Doha Round with Key Countries*, INSIDE U.S. TRADE, Oct. 9, 2009.

100. Daniel Pruzin & Eric J. Lyman, *Doha Talks Collapse Over U.S.-India Dispute On Ag Safeguards; Future of Round in Doubt, Int'l Trade Daily*, (BNA) (July 30, 2008).

101. *Id.*

insisted that it could not accept a threshold lower than a forty percent increase in imports.[102] Although India has not shifted from its position on the SSM,[103] there have been indications that some understanding may have been achieved on this issue. WTO Deputy Director General Harsha Vardhana Singh stated in an October 2009 interview that India's concerns on the SSM had been addressed at the G-7 level, and that the next step would be the multilateralism of the agreement.[104] At the time this article was submitted for publication, details regarding that agreement were not readily available. But there has been little movement on the other agricultural issues, including the treatment of sensitive products, tariff capping, and the creation of tariff rate quotas.[105]

An important issue on the table in the NAMA negotiations is that of sectorals. Some Indian officials even feel that the issue of sectorals has replaced differences in the agricultural negotiations as the biggest obstacle in the Doha Round.[106] Sectoral agreements commit the parties to cutting import duties in certain sectors more drastically than general tariff reductions. Sectorals have been proposed in fourteen areas, including auto parts, bicycles, chemicals, electronics, fish and forestry products, gems, and toys. Participation in sectorals was supposed to be voluntary, based on a declaration signed at the 2005 WTO Hong Kong Ministerial.[107] In 2009, however, developed countries, including the United States and Australia, have been pushing India, China, and Brazil to commit to such tariff reductions in at least three sectors, in particular chemicals, auto components, and electronic items, stating that there will be no Doha deal until India, China, and Brazil agree to sectoral agreements.[108] India has not been opposed to the sectorals altogether, but it opposes on principle any mandatory sectoral tariff reduction for developing countries.[109] The NAMA-11, a coalition of developing countries of which India is a part, issued a statement in 2008 to the chair of the NAMA negotiations that there should be no compromise language to alter the voluntary status of sectoral negotiations.[110]

The United States has also said that it will not endorse a new agreement unless it contained a comprehensive deal on services,[111] providing for new market opportunities.[112] Although Minister Sharma said in October that it was time for negotiations on services to

102. *Id.*

103. *See India Opposed to Reinventing Doha Talks*, REDIFF BUS., June 29, 2009, http://business.rediff.com/special/2009/jun/29/india-opposed-to-reinventing-doha-talks.htm.

104. Asit Ranjan Mishra, *Sectoral Tariff Reductions Emerge as Next Obstacle in WTO Talks*, LIVEMINT, Oct.12, 2009, *available at* http://www.livemint.com/2009/10/11225736/Sectoral-tariff-reductions-eme.html.

105. Daniel Pruzin, *WTO Chief Warns 2010 Deadline for Doha Hard to Meet Without 'Serious Acceleration'*, 26 INT'L TRADE REP. (BNA) 1414 (Oct. 22, 2009).

106. *See* SEBI Press Release, *supra* note 16.

107. *Id.*

108. Asit Ranjan Mishra, *India Urged to Soften Stance on Tariff Cuts*, LIVEMINT, Sept. 2, 2009, http://www.livemint.com/2009/09/02223516/India-urged-to-soften-stance-o.html.

109. *See* SEBI Press Release, *supra* note 16.

110. D. Ravi Kanth, *India Snubs US Attempt to Change Doha Tariff Cut Talks*, BUS. STANDARD, Oct. 30, 2008, http://www.business-standard.com/india/news/india-snubs-us-attempt-to-change-doha-tariff-cut-talks/338723/.

111. The WTO listing of services includes a variety of service sectors, including business and professional services (such as accountancy, advertising, architecture, and legal services), communication services, construction and related services, distribution services, educational services, energy services, environmental services, financial services, health and social services, tourism services, and transport services. A complete listing is provided in the WTO Services Sectoral Classification List, *available at* http://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

proceed,[113] India and other developing countries rejected a move by the United States, Australia, and Canada to prepare a draft scheduling of commitments in Doha services negotiations, until other issues, such as the market access commitments in agriculture and industrial goods, were finalized.[114] For India, a long-standing important issue on services has been to get concessions from developed countries on Mode 4, which relates to the movement of persons to work temporarily in other countries.[115] India seeks to increase its professional workers' ability to go to developed countries to work temporarily.[116]

WTO Director General Pascal Lamy has said that an agreement on Doha cannot be reached by 2010 unless countries accelerate negotiations.[117] While the United States appears to have taken an all or nothing approach, India advocated a "Doha-lite" approach.[118] There have been references to a G-2 emerging between China and the United States on issues of the global economy and climate change.[119] One might argue that India and the United States are a G-2 in the context of the Doha Round negotiations, with India among the most vocal of the developing countries. Certainly, agreement between the two countries on key issues is going to be essential to a successful outcome in 2010.

V. The Companies Bill, 2009–Impact on Cross Border Investments into India

Generally, cross-border investments into India occur through joint ventures, acquisitions, establishment of wholly owned subsidiaries, and, of course, venture capital or private equity acquisitions. The Companies Bill, 2009 (Bill) proposes to introduce certain radical changes to the extant Companies Act, 1956 (Act). Some of the relevant changes in the context of cross-border investments are highlighted in this article.

Under the Act, equity shares with differential rights as to voting, dividend, or otherwise (DVRs) are permissible, though public companies have restricted ability with regard to issuance of the same. Due to the availability of DVRs, offshore investments into Indian companies can easily be customized to meet the economic interests of the investors and investors may realize certain management rights. The Bill proposes to do away with DVRs altogether.[120] Sections 90 and 170 of the Act exempt private companies from having to structure their share capital and convene and hold member meetings strictly as prescribed under the Act.[121] There are no corresponding provisions in the Bill. The

112. Doug Palmer, *U.S. Needs More on Services from Doha Round: Kirk*, REUTERS, Oct. 13, 2009, http://www.reuters.com/article/politicsNews/idUSTRE59C2YG20091013.

113. *India Wants Balanced and Fair Doha Deal*, DOW JONES FACTIVA, Oct. 15, 2009.

114. D. Ravi Kanth, *India rejects Draft WTO Services Schedule by US*, BUS. STANDARD, Oct. 23, 2009, http://www.business-standard.com/india/news/india-rejects-draft-wto-services-schedule-by-us/374076/.

115. *See Good Mode 4 Offer is Critical for India*, FIN. EXPRESS, Dec. 14, 2005, http://www.financialexpress.com/news/good-mode-4-offer-is-critical-for-india/155805/2.

116. *Id.*

117. Pruzin, *supra* note 105.

118. Matthias Williams, *India Says Doha Deal Does Not Have to Be Perfect*, REUTERS, Oct. 30, 2009, http://in.reuters.com/article/topNews/idINIndia-43565720091030.

119. *See, e.g.*, *China and America: The Odd Couple*, ECONOMIST, Oct. 22, 2009, http://www.economist.com/opinion/displaystory.cfm?story_id=14699593 (noting, however, that a G-2 between China and America is a dangerous misperception).

120. *See* TAXMANN, GUIDE TO COMPANIES BILL 2009 (2009).

121. *See* TAXMANN, CORPORATE LAWS (2009).

withdrawal of these privileges enjoyed by private companies is a retrograde step and will add to the burdens faced by offshore investors.

Clause 6 of the Bill radically departs from Section 9 of the Act.[122] Specifically, there is no equivalent in the Bill of Section 9(a) or (b) in the Act. This creates a situation where the Articles of Association (AOA) can have more demanding provisions than those contained in the Act, especially regarding the rights of management and shareholders. Proviso to Clause 6(2) and the provisions of Clause 6(3) of the Bill further strengthen this burden by allowing reproduction of the provisions of shareholders agreement in the AOA (and therefore doing away with reservations as to its enforceability in a court of law).[123]

Section 4(7) of the Act is one of the most convoluted provisions and is often the bone of contention between lawyers and statutory auditors. This section effectively deems a private company (which is a subsidiary of a foreign company) to be a public company under the Act unless: (i) the foreign company is incorporated as a private company for purposes of the Act, or (ii) the entire shareholding of the Indian subsidiary is held by one or more foreign companies alone (whether private or public).[124] Given that there is no equivalent provision under the Bill, a private company, even if it is a subsidiary of a foreign public company and has Indian shareholders, would still be deemed to be a private company.

The Act states that "the shares or debentures and any interest therein of a company shall be freely transferable."[125] The Bill does not contain an equivalent provision. Therefore, restrictions on a transfer of shares may be enforceable under the Bill, more so given Clause 6 of the Bill. There are growing concerns as to whether the AOA can contain restrictions on transferability as between or against a particular block of shareholders (not being public or unidentified shareholders).

A notable and welcome change is the introduction of a one-person company, which, as the name suggests, requires just one person to incorporate and manage. This facilitates setting up 100% subsidiaries without the need to have nominee shareholders.

There have been instances where substantial assets of a company have been sold by the dominant group without the consent of other shareholders (most notably with offshore investors). Under the Act, consent of the shareholders is required only if such sale constitutes whole or substantially the whole of the undertaking of the company.[126] A sale of shares of group companies made without the shareholders' consent, even when it constituted the controlling stake and was the whole of its assets, have been allowed.[127] The Bill addresses this lacuna by defining the term "undertaking" as any investment of the company which exceeds twenty percent of its net worth or generates twenty percent of the total income, and defining the phrase "substantially the whole of the undertaking" as twenty percent or more of the value of the undertaking.[128]

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122. The Companies (Amendment) Bill, 2009, No. 59, Acts of Parliament § 6, 2009 (introduced in the lower house Lok Sabha on August 3, 2009).

123. *Id.*

124. The Companies Act, 1956, No. 1, Acts of Parliament § 4(7), 1956.

125. *Id.* § 111A(2).

126. *Id.* § 293(1)(a).

127. *See* CDS Fin. Servs. (Mauritius) Ltd. v. BPL Commc'ns Ltd., (2004) 121 CC 374 (Mumbai H.C. 2001), *available at* http://www.indiankanoon.org/doc/1031140/.

128. The Companies (Amendment) Bill No. 59 § 160(a).

Under the Act, cross-border mergers are permissible, subject to the caveat that the transferee is required to be an Indian company. Under the Bill, Indian companies may merge into a foreign company. The Bill exempts mergers between a holding company and its wholly owned subsidiary and mergers between small companies from the formal judicial process. Additionally, the Bill enables the merger to be affected by internal arrangements only, subject to registering the same with the registrar and official liquidator.

From the logistics and flexibility perspective, the Bill explicitly provides for participation by directors in board meetings through video conferencing or other electronic means as may be prescribed. The *Bill* further provides that the presence of directors so participating shall be counted toward quorum. As far as shareholders are concerned, the Bill introduces the concept of postal ballot voting and electronic voting for unlisted companies. This will provide comfort for offshore investors concerned about shareholders meetings being purportedly held without their knowledge.